REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

DATE: 2017-03-02 SIGNATURE:

CASE NO: 4059/2016

In the matter between:

MISABENI KHOSA AND ASSOCIATES	**APPLICANT**
And	
MR CHUMA	**1ST RESPONDENT**
MR PATEL	**2ND RESPONDENT**
GREATER GIYANI MUNICIPALITY	**3RD RESPONDENT**
LIMPOPO DEPARTMENT OF HUMAN SETTLEMENT	**4TH RESPONDENT**
ANY TRADITIONAL AFFAIRS	
DEPARTMENT OF ECONOMIC, DEVELOPMENT,	**5TH RESPONDENT**
AND TOURISM	

MABUNDA TRADITIONAL AUTHORITY	**6TH RESPONDENT**
CHIEF MABUNDA	**7TH RESPONDENT**

JUDGMENT

NF KGOMO J

INTRODUCTION

[1] On 2017-02-17 the following order was issue in this matter:

> "1. The application is dismissed with costs.
>
> 2. Reasons for judgment will follow in due course."

[2] Herewith are the reasons:

Notice of Motion

[3] On 09 September 2016 the applicant herein launched an application on an urgent basis subject to Rule 6 (12) of the Uniform Rules of Court praying for an order:-

3.1 That non-compliance with the Rules relating to service and forms of process be condoned and that this matter be heard as an urgent one in terms of Rule 6 (12) of the Uniform Rules of Court.

3.2. That the 1st and 2nd respondent be interdicted and/or prohibited from developing and/or building on the applicant's site or land referred to in paragraph 5 of the affidavit.

3.3 That the 1st and 2nd respondent's be interdicted and/or prohibited from entering the applicant's land or site situated at corner R81 road to Malamulele and the D.3634 road to Siyandlani Village in the Greater Giyani Municipality.

3.4. That the 1st and 2nd respondents and/or their employees or any one acting on their instructions or their agents, be ordered to remove or move away their building material from the site and to stop the developments and/or building of a wall around or at the applicant's land or site.

3.5. That this Honourable Court find that the land or site in question was lawfully allocated to the applicant for development and that the applicant still has or retains the right to develop it.

3.6 That this Court find that the said land was never allocated or transferred to the 1st and 2nd respondents as alleged or at all.

3.7 That those respondents who oppose this application be ordered to pay all the costs of suit on a scale as between attorney and client.

3.8 that no order of costs is asked against the 3rd to 7th respondents unless they oppose this applications.

[4] The applicant does not identify the land or side by its number or any other citation recognized by agencies or institutions of governance that deal with allocation of transfer of properties,. It merely describes it as the land or site situated at the corner of the R81 road leading to Malamulele and road D3634 leading to Siyandlani Village, in the Giyani district or municipality.

Citation of the parties herein

[5] The applicant is cited as Misabeni Khosa and Associates; ex facie this citation the expectation is that this would be a legal persona or institution. When regard is had to Annexure "MK2" attached to the papers herein, where Misabeni Simon Khosa and Associates is cited as a (Pty) Ltd, i.e a Limited liability company, then the above assumption assumes finality. That is why the applicant's founding affidavit allegation[1] by its deponent that he is the applicant herein appears mistaken.

[6] The applicant's founding affidavit[2]states that the 1st respondent carries on business at the very site or land in dispute, namely, the place situated at corner R81 road to Malamulele and D.3634 road to Siyandhlani village.

Applicant's claim to title to dispute land

[1] At paragraph 1.2 thereof at Folio 6 of the paginated pages herein.
[2] Paragraph 2.1 at folio 6

[7] According to the applicant, the land in question was under the control of the 6th and/or 7th respondents in terms of Proclaimation R293 of 1962 made in terms of the Black Administration Act.[3]

[8] According to it further, on 6 January 2015 the 6th respondent.... was ordered to transfer the said site into the applicants names.... The above allegation is inconsistent with original acquisition of the land as the 6th respondent; Mabunda Traditional Authority is expected to have had the original right to decide who to allocate the land to without being ordered to do so by a court of law first.

[9] The applicant relies for the above allegation on a Court order by Magistrate Giyani under case number 1127/2014 which was handed down on 2 January 2014. It is marked Annexure 'MK2" at Folio 18 of the paginated pages herein. The parties thereto are Misabeni Simon Khosa and Associates (Pty) Ltd as the applicant and John Hlungwane Construction and Projects (Pty) and Hlengani John Hlongwani as the first and second respondents respectively.

[3] Act 38 of 1927, as amended

[10] According to it further, the land in question –

> *"..... was to be demarcated by COGSTA wherein the demarcation could not take place as COGSTA officials informed the applicant that same cannot take place as there is (sic) construction on site.....*

[11] The above translate into the fact that when the in paragraph 8 herein before process took place, the applicant had not had or enjoyed *vaccuo possesio* to the land or site.

[12] The above constitute the applicant's high-water-mark as to its claim to right and title to the disputed land. No document or proof aliundi substantiating the applicant's claims was furnished. Even during the argument of this matter the applicant did not produce any documentary proof of its allegation.

Respondents' claim to tittle to the land

[13] Contrary to the applicant, the first respondent named the disputed site or land as stand number 1459 A and B, Siyandlani, Giyani. He

also attached an aerial photograph depicting the full extent of the property[4].

[14] According to the 1st respondent further, he has been in peaceful and undisturbed possession of the property in dispute since 1997 when he applied for and was granted permission to occupy same from Siyandlani Traditional Council. Validation for the grant was to be valid building plans, which he submitted to the Traditional Authority.[5] He traded as a cement distributor on the site from that period.

[15] With the evolving post-colonial or post-apartheid dispensation he re –applied for confirmation of his occupancy rights to the property to the then Northern Province Local Government and Housing Department in May 2001. Approval thereof was granted to him on 28 May 2001 and written documentation confirming same[6] was issued to him. The legality and conformity with legal prescripts by

[4] Annexure "LC2" to the paginated paper at Folio 68
[5] See annexure "LC3) at Folio's 69 and 70 of the paginate paper herein.
[6] Annexure "LC4" ans 'LC5" at Folios 71 and 72 of the paginated papers.

the business he ran on the property was confirmed by the Department of Health and Welfare[7].

[16] After the present political dispensation came into being and during 2006 the Limpopo Provincial Department issued the applicant with a "Permission to Occupy" issued in terms of Proclamation R188 of 1968[8].

[17] During February 2007 the Siyandlani Traditional Council granted the 1st respondent leave or permission to run a wholesale Liquor Outlet on the property or site.[9]"The business has been operating on the site from September 2008 to date. Between then and 2012 further extensions and additional storage facilities were added to or on the site and they covered some 1500 square meters.

[18] The 1st respondent leased part of the property or business to the 2nd respondent in September 2008 and the latter has been conducting business thereon by virtue of a substantive lease

[7] See Annexure "LC6" at Folio 73 of paginated pages.
[8] Annexure 'LC7" at Folio 74 of paginated pages.
[9] Annexure "LC9" at Folio 78 of paginated papers

agreement between the parties[10] to date. During August 2012 Siyandlani Traditional Council granted the applicant a long-term lease.[11]

[19] According to the 1st respondent, the property is fenced. He categorically denied the applicant's contention that a wall was being built around it. To that effect he attached photographs of the site or property to the papers herein[12]

EVALUATION

[20] It should be mentioned that the 3rd to 7th respondents have not opposed this application. Thus Court assumes they abide its ruling at the end.

[21] As already alluded to above, the applicant is Misabeni Khosa and Associates. However, the resolution taken authorizing the deponent of the applicant's founding affidavit was taken by Misabeni Khosa and Asscociates (Pty) Ltd, a limited liability

[10] See Annexure "LC10" at Folios 79 -87
[11] See Annexure 'LC11" at Folios 88 - 96
[12] Annexure 'LC14.1 -14.14 at Folio's 97 -115

company. Furthermore, the deponent of the founding affidavit, Misabeni Khosa, gave himself forth therein as ..... the applicant in this matter.

[22] The above creates problems for the application and the respondents' contention that the founding affidavit is so defective that it should be struck out may have substance.

[23] The applicant referred to a Giyani Magistrates Court order to Misabeni Khosa and Associates (Pty) Ltd against respondents who are not the respondents herein. Unfortunately, that court order cannot affect the orders to be granted herein: That order was an interim one. Nowhere in the papers herein and even during argument of this matter was at alluded to that the interim order was confirmed or why it is relevant to this application. The litigants are different parties to the parties herein, including the applicant.

[24] The applicant claims title to the dispute property. Nevertheless, he or it does not even know what it is named or titled. The 1st respondent on the other hand named and titled the erf.

[25] According to the applicant, it applied for and was granted business rights over the disputed land. A look at Annexure "MK4" [13] attached to the applicant's founding affidavit shows that –

25.1 The site for which business rights were approved to MK and Associates on 10 June 2016 was site No. 10 at Siyandlani Village. The 1st respondent's site is 1459 A and B, Siyandlani Village. These are totally different sites.

25.2 Before that application for business rights could be finalized, a whole list of requirements from the Department of Economic Development, Environment and Tourism, Energy, Eskom, approval from Greater Giyani Municipality, Roads Agency Limpopo, Floodline certificate from a competent and qualified engineer as well as fire certificate from the Mopani District Municipality still had to be supplied.

[13] At Folio 22 if paginated pages

[26]. Only after the above requirements had been met [14] would a permission to Occupy be issued by the Greater Giyani Municipality to the applicant in respect of site No. 10, Siyandlani.

[26] As against the above, the 1st respondent already has permissions to occupy to the disputed property.

[27] As against the above, the 1st respondent already has permissions to occupy to the disputed property.

URGENCY

[28] The respondents challenged the urgency of the application.

[29] Rule 6 (12) (b) of the Uniform Rules reds as follows:-

> *"(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the*

[14] Folios 22 and 23, Annexure "MK4'

circumstances which he avers renders the matter urgent and the reasons why he claims that he could not be afforded substantial relief or redress at a hearing in due course."

[29] In **Luna Meubels Vervaardigers v Makin and Another** [15] degress of urgency were set out as follows:[16]

"1. *The question is whether there must be a departure at all from the times prescribed in Rule 6 (5) (b). Usually this involves a departure from the time of seven days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirements may be ignored and the application may be set down for hearing on the first available motion day but regard must still be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be presided over by the Motion Court Judge on duty for that week.*

2. *Only if the matter is so urgent that the applicant cannot wait for the next motion day, from the point of view of his obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday without having filed his papers by the previous Thursday.*

---

[15] 1977 (4) SA 135 (W)
[16] At 137 A - E

3. *Only if the urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing in the next Court day at the normal time of 10:00 a.m or for the same day if the Court has not yet adjourned.*

4. *Once the Court has dealt with the cases for that day and has adjourned, only if the applicant cannot possibly wait for the hearing until the next court day at the normal time that the court sits, may he set the matter down forthwith for hearing at any reasonably convenient time, in consultation with the Registrar, even if that be at night or during a weekend."*

[30] The urgency required for a matter to be heard in Court pursuant to Rule 6 (12) must be genuine and not contrived or self-created. The urgent court is not the court to decide complex legal and factual issues. It is a court that ensures that in cases of emergency the chance of either party suffering irreparable harm is reduced to a minimum pending the final determination of the case as a whole[17].

[31] The applicant has not set out enough or cogent facts and circumstances that would have normally justified this matter to be decided or heared in the urgent court. That regardless,

[17] See Twentieth Centuary Fox Film Corporation v Anthony Black Fils (Pty) Ltd 1982 (3) SA 582 (w); IL & B marcow Caterers (Pty) Ltd v Creatermans SA Ltd & Ano 1981 (4) SA 108 (C)

unexpected factors interceded that caused this matter to be dragged out without urgency being decided: On 28 September 2016 the Judge President of this division postponed the matter for certain issues to be done. That was after the applicants on their own and on 19 September 2016 removed it and re-enrolled it on 27 September 2016 earlier. As a result, the matter cannot be urgent even if initially it was (which is not the case here nonetheless.)

[32] The parties were asked to argue the matter's merits.

[33] As already alluded to, the applicant has argued from the air, without producing any written confirmation of his allegations whereas the 1st respondent submitted and backed his submissions with documentary proof.

[34] The applicant does not even know what the citation or number of his alleged site or land is. The respondent named it and backed it up with aerial photos and other documents.

[35] The applicant avers without proof or substantiation that he is the owner. The 1st respondent backed his claim with documents from the Siyandlani Traditional Council, the Northern Province Government, Limpopo Government and other relevant Government Department and institutions. As a result from the totality of the circumstances herein, the respondents' version of events is more probable. In short, the applicant has not made out a case for the grant of the prayers that he be declared the lawful owner or possessor of the disputed property.

[36] The applicant submitted without any substantiation that he was in possession of the property when he was despoiled. However, he does not gain- say the 1st respondent's allegation or averments that he was granted the use and possession ever since 1997 to date. Worse still for the applicant, its version is also that it would only be issued with a permission to occupy upon it satisfying the requirements listed by the Greater Municipality in their letter dated 10 June 2016. This too, is inconsisted with the truth when the applicant's version is anything to go by.

CONCLUSION

[37]. After weighing and evaluating all points relative hereto, this application was and is not urgent. However, as argument on the merits was allowed, the matter will be decided as a whole.

[38]. The Applicant has not made out a case for the grant of the interdict. It has not proved a clear or *prima facie* right. As such its *locus standi* to aks for relief as it did is non-existent. There is no evidence that the land in dispute was ever allocated to it (the applicant). On the other hand, the 1st respondent has proved that he was properly allocated the disputed land by various authorized instances including Government Departments as well as the Traditional Council in charge.

[39] Consequently, the applicant's application stands to fail.

COSTS

[40] The applicant has sought and argued for an order of costs on a punitive scale as between attorney and client against those respondents who opposed its application.

[41] The 1st respondent submitted that the application is ill-thought capricious and an abuse of court process that should be punished with a punitive costs order.

[42] The issue of which costs order to follow a result in any litigation is within the discretion of the trial Court.

[43] The nature of the applicant's claims are such that they lacked merit. Worse still, it brought the application on urgent basis without stating the grounds that justify that.

[44] Indeed the applicant's conduct was ill – thought, capricious, mendacious and an abuse of court process. Such conduct must me punished with an order of costs on a punitive scale.

ORDER

[45] The following order is made;

46.1. The application is dismissed with costs on a scel as between attorney and client.